Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Application of Tele-communications, Inc.	)	
and AT&T Corporation for Transfer of	)	**CS Docket No. 98-178**
Control of Commission Licenses and	)	
Authorizations	)	

To the Commission:

MOTION TO ACCEPT LATE FILED PETITION TO DENY

Hiawatha Broadband Communications, Inc., hereby respectfully requests permission to have the attached "Petition to Deny" included in the record of the above-captioned proceeding, even though the formal comment and reply comment period has lapsed. The motion does not raise a new substantive issue but rather builds on the existing record concerning the issue of exclusive program agreements. In addition, the motion brings to the Commission's attention relevant findings of the Commission's *Fifth Annual Report* on the status of video competition that was not previously available.[1]

In the alternative, Hiawatha requests that the attached pleading be considered as a written *ex parte* communication pursuant to 47 C.F.R. 1.1206.

[1] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Competition Report,* CS Docket No. 98-102, adopted December 17, 1998.

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To the Commission:

PETITION TO DENY OF HIAWATHA BROADBAND COMMUNICATIONS, INC

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December 30, 1998

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Summary

Hiawatha Broadband Communications, Inc., a facilities-based broad band service provider in Winona, Minnesota, is attempting to inject head-to-head competition into the local multichannel video and telecommunications market as envisioned by Congress. Unfortunately, the entrenched incumbent cable television provider, TCI, has been able to leverage its monopoly position over a large number of cable subscribers throughout the Upper Midwest to extract exclusive access arrangements for essential regional sports programming that effectively precludes meaningful competition in individual communities such as Winona.

TCI's ability to abuse its market dominance in this manner, if left unchecked, will be perpetuated and reinforced by the size and scale it will obtain as a result of its proposed merger with AT&T. In addition, the ability of a combined AT&T and TCI to include exclusive regional sports programming into a bundled voice, data and video offering, will distort competition, and is clearly against the public interest. Accordingly, the Commission should deny the proposed transfer of control absent an agreement on the part of AT&T and TCI that they will waive any exclusive access arrangements for popular regional sports programming.

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To the Commission:

PETITION TO DENY
OF HIAWATHA BROADBAND COMMUNICATIONS, INC.

I. Introduction

Hiawatha Broadband Communications, Inc. hereby respectfully submits this petition to deny the above-captioned applications for transfer of control between Tele-Communications Inc., (TCI) and AT&T Corporation, unless certain conditions are placed on the authorization.[1] Hiawatha Broadband Communications is a Minnesota corporation with its offices and principal facilities located in Winona. Its shareholders are local individuals, who own about 60% of the outstanding shares, and local schools and universities and their supporting foundations, who own about 40% of the outstanding shares (all donated to them by the individual shareholders). Its mission is to enhance education and communication through advanced technology. The company is in the midst of building an HFC communications network in Winona, Goodview and surrounding areas. It intends to offer cable programming (educational and entertainment), as well

[1] Simultaneously with this filing Hiawatha submitted a motion to accept this petition as late filed comments or in the alternative to treat it as a written *ex parte* communication pursuant to 47 C.F.R. 1.1206(b)(1).

as internet services, and video, voice and data communications services. Cable franchises have been secured from Winona and Goodview.

Hiawatha is attempting to inject head-to-head facilities-based competition into the local multichannel video programming, data and telecommunications service markets in precisely the manner envisioned by Congress in its enactment of the Telecommunications Act of 1996. Unfortunately, the entrenched incumbent cable television provider, TCI, has been able to leverage its monopoly position over a large number of cable subscribers throughout the Upper Midwest to extract exclusive access arrangements for essential regional sports programming that effectively precludes meaningful competition in individual communities such as Winona. TCI's ability to abuse its market dominance in this manner, if left unchecked, will be perpetuated and reinforced by the size and scale it will obtain as a result of its proposed merger with AT&T. Such a result will distort competition, and is clearly against the public interest. Accordingly, the Commission should deny the proposed transfer of control absent an agreement on the part of AT&T and TCI that they will waive any exclusive access arrangements for popular regional sports programming.

II. The Scope of the FCC's Review Properly Includes The Imposition of Conditions Designed to Foster Competition

The FCC has undertaken the current review of the proposed transfer of control of licenses and authorizations held by TCI or its affiliates to AT&T, pursuant to the requirements of Section 310(d) of the Communications Act of 1934, as amended.[2] Section 310(d) provides that:

> *No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.*

[2] 47 U.S.C. 310(d).

As indicated above, and as the FCC has repeatedly concluded, it can only approve the transfer of control of licenses and authorizations from one licensee to another upon a demonstration by the applicants that such transfer will serve the "public interest, convenience, and necessity." [3] As a consequence, the protestations of AT&T and TCI notwithstanding, the scope of the Commission's jurisdiction under Section 310 is flexible and sufficiently broad to encompass Hiawatha's requested relief.

In other merger proceedings involving applications for consent to transfers of control, the FCC has explicitly held that the public interest standard includes implementation of the "pro-competitive, de-regulatory national policy framework designed to open all telecommunications markets to competition," as expressed in the Telecommunications Act of 1996.[4] The FCC has also held that it must analyze whether a proposed acquisition will "promot[e] the competition policies of the Sherman Act and the Clayton Acts."[5] As is demonstrated below, and in related petitions to deny, the issue of exclusive program access agreements directly impacts the development of effective competition and implicates antitrust considerations of the Sherman Act.

Further, the FCC has concluded that the burden to demonstrate that the transfer is in the public interest is on the parties seeking consent to the merger.[6] It is therefore the responsibility of AT&T and TCI to conclusively demonstrate that all aspects of the merger are in the public interest and advance the competitive goals of the Telecommunications Act, including any existing program exclusivity arrangements.

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[3] *In the Matter of Transfer of Control from MCI Communications to WorldCom, Inc., Memorandum Opinion and Order (WorldCom/MCI Order)*, FCC 98-225, at ¶¶ 8-10, September 14, 1998; *In the Matter of Transfer of Control from Teleport Communications to AT&T Corp., Memorandum Opinion and Order (AT&T/Teleport Order)*, FCC 98-169, at ¶ 11, July 23, 1998.
[4] *WorldCom/MCI Order*, at ¶ 9.
[5] *AT&T/Teleport Order*, at ¶ 11.

Finally, it is well established that Section 303(r) of the Communications Act (General Powers of the Commission) provides the FCC with authority to "attach conditions to the approval of a transfer of license" if necessary "to ensure that the public interest is served by the transaction."[7] This authority to impose conditions on the approval of transfers is one of the pro-competitive "tools" that Congress has given the FCC to ensure the development of robust competition and should be utilized to correct market abuses and to ensure that such abuses are not perpetuated.

III. Program Access Is An Essential Component of Competition

A. Competition Has Not Developed In The MVPD Market

The FCC's most recent assessment of the status of competition in the multichannel video program distribution (MVPD) market concludes that incumbent cable television companies continue to exercise pervasive dominance over the video marketplace.[8] The *Fifth Annual Report* finds that while competitive alternatives and consumer choices are beginning to develop, cable television continues to be the primary delivery technology for the distribution of multichannel video programming with 85% of all MVPD subscribers still receiving video service from the incumbent operator. Summarizing this information FCC Chairman Kennard stated: "Our annual report shows that, although competition is increasing, the level of competition that consumers are seeking has not yet arrived."[9]

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[6] *In the Matter of Transfer of Control from Southern New England Telecommunications to SBC Communications, Memorandum Opinion and Order*, ¶ 13, October 23, 1998.
[7] *AT&T/Teleport Order*, ¶ 10.
[8] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Competition Report,* CS Docket No. 98-102, adopted December 17, 1998.
[9] *Statement of Chairman William Kennard, Fifth Annual Report.*

During the period under review the *Fifth Annual Report* indicates that cable rates continued to rise. Between June 1997 and June 1998, based on Bureau of Labor Statistics data, cable prices rose 7.3% compared to a 1.7% increase in the Consumer Price Index (CPI). Significantly, the *Fifth Annual Competition Report* revealed that in those few communities where the incumbent cable operators face competition "cable operators respond in a variety of ways, including lowering prices, adding channels at the same monthly rate, improving customer service, or adding new services such as interactive programming."

In light of the lack of widespread competition and ever escalating rates, members of the House and Senate Commerce Committees have expressed growing concerns about the approaching sunset of cable rate regulation in march 1999. The release of the *Fifth Annual Report* confirms Chairman Kennard's dire prediction of a year ago:

> *Although increased prices have been accompanied by additional programming, consumers have no real opportunity to choose a range of programming at varying prices. Our Report indicates that the presence of true, head-to-head competition to cable has a substantial downward effect on cable rates. Prices, not surprisingly, appear lower where there is competition than where there is none. But the much anticipated competition has yet to arrive. The loser is the American public. They must pay the higher cable prices yet they have few competitive choices. Policymakers should no longer have high hopes that a vigorous and widespread competitive environment will magically emerge in the next several months to reverse the troubling increase in cable rates. I fear it will not."*[10]

Given the concentrated nature of the MPVD environment and the imminent elimination of rate regulation for most cable services, it is vitally important that the FCC take every opportunity to act aggressively to foster competition in the video services market by removing unfair,

[10] *Accompanying Statement of FCC Chairman Kennard, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report,* CS Docket No. 97-141, adopted December 31, 1997.

monopoly-derived advantages, wherever and whenever possible. The AT&T and TCI transfer application presents just such an opportunity.

B. Exclusive Arrangements For Regional Sports Programming With MSO's Are Inherently Anticompetitive

The rationale behind the sunset of cable rate regulation was the belief that the 1992 Cable Act, as amended by the Telecommunications Act, effectively eliminated all barriers to competition, and that by the Spring of 1999 robust competition in the MVPD market would provide an effective check on the ability of incumbents to raise rates excessively. As part of this strategy, Congress recognized that access to quality popular programming by new entrants, on the same terms as it is available to incumbent operators is a necessary component of developing competition. In order to prevent large multi-system operators (MSOs) from using their market power to deny program access to new entrants Congress adopted the "program access" provisions of the 1992 Cable Act.[11]

In an effort to address the most flagrant abuses, Congress directed the focus of the program access provisions to prohibiting exclusive agreements between vertically-integrated satellite cable programmers and cable television operators, and as a consequence did not specifically prohibit exclusive arrangements between non-vertically integrated entities. TCI has seized upon this loophole in the program access rules and utilized its market power as an MSO to extract exclusive program access agreements from non-vertically integrated programmers in a manner that violates the spirit, if not the specific letter of the law.

As Ameritech points out in its comments in opposition to the transfer:

> *TCI has been able to extract such concessions largely because of its position as an incumbent cable operator, and therefore its control over substantial numbers of subscribers. These exclusive arrangements deny Ameritech and other new*

[11] 47 U.S.C. 548.

entrants access to popular, quality programming networks, and place them at a distinct disadvantage in assembling appealing packages of video programming. Such arrangements therefore seriously limit any new entrant's ability to compete effectively based on service quality, and perpetuate incumbent cable operators' dominance in the market for multichannel video programming.[12]

In its *Fifth Annual Competition Report* the Commission appears to recognize the importance of this issue stating:

MVPDs that provide competitive pressure on incumbent cable operators and provide consumers with real choice still find regulatory and other barriers to entry in to markets for the delivery of video programming. MVPDs with the potential to compete with incumbent cable operators continue to experience some difficulties in obtaining programming, both from vertically integrated satellite cable programmers and from unaffiliated program vendors who continue to make exclusive agreements with cable operators.[13]

Exclusive program access arrangements involving regional sports programming are especially damaging to the ability of new entrants to effectively compete against large MSOs such as TCI. In many areas of the country, particularly in smaller communities, access to popular regional sports programming is essential to the success of a new cable provider. In its recently released *Fifth Annual Competition Report* the Commission recognized the vital importance of access to regional sports programming noting: *"sports programming in the market for the delivery of video programming increasingly warrants special attention because of its widespread appeal and strategic significance for MVPDs."*[14] Further, the FCC observed that *"[l]ocal sports also holds value for operators because of local sporting events often generate higher ratings than other cable and broadcast programming."*[15]

[12] Ameritech Comments, p. 36.
[13] *FCC News Release,* summarizing the Commission's *Fifth Annual Competition Report,* December 17, 1998.
[14] *Fifth Annual Competition Report,* ¶ 171.
[15] *Fifth Annual Competition Report,* ¶ 175.

The significance of regional sports programming is illustrated by the fact that in many instances, an incumbent cable operator with a poor service record will be able to retain customers in the face of competition if the competitor's service does not include popular regional sports programming. In such situations, the incumbent is not competing on the merits of its service but on its ability to unfairly leverage its size and incumbency.

This is precisely the anticompetitive situation that Hiawatha and other new broadband video providers face in markets in the Midwest who desire to obtain access to the Midwest Sports Channel (MSC). MSC is a leading regional sports channel in the Upper Midwest that controls the broadcast rights to some of the most popular local sporting events in Minnesota and neighboring states such as South Dakota. Among other sporting events, MSC carries Minnesota Twins baseball, Minnesota Timberwolves basketball, and University of Minnesota football, hockey and basketball, as well as other regional college sports teams. Hiawatha has been unable to obtain access to MSC for its subscribers due to an exclusive regional agreement between MSC and TCI which TCI extracted from MSC through the use of its dominant position in the market.

Other commenters in this proceeding have indicated that they have experienced similar abusive conduct by TCI with regard to exclusive access arrangements. For example, Seren Innovations, a competitive cable provider in St Cloud, Minnesota, has indicated that TCI's exclusivity agreement with MSC has precluded it from obtaining access to popular sports programming. Seren correctly characterized TCI's activities as "exploit[ation] [of] its dominant position to handicap Seren and other similarly situated entrants while they are still in the starting blocks."[16] As Seren notes, this conduct is an anticompetitive abuse by TCI of its dominant

[16] Seren Petition to Deny, p.5.

position in local cable markets, and such dominance will be reinforced by the merger with AT&T.[17]

The merger with AT&T will further exaggerate the anticompetitive impact of TCI's exclusive programming agreements for entities such as Hiawatha that intend to compete not just in video but in the integrated broad band market of video, telephony and data. The ability of AT&T and TCI to leverage their formidable assets and brand name recognition will pose a significant challenge to new entrants such as Hiawatha. The inclusion of exclusive access to popular regional sports programming as part of a bundled offering of local, long distance, Internet and cable services by a combined AT&T and TCI will likely strike a crippling blow to these small entrepreneurs. Hiawatha is willing to take on Goliath but it implores the FCC not to send it out with an empty sling.

C. The FCC Should Condition The Consent To Transfer On AT&T/TCI's Agreement To Waive Existing Exclusive Regional Sports Programming

In their reply comments, AT&T and TCI attempt to brush-off the concerns regarding TCI's exclusive program access agreements by arguing that such arrangements are not prohibited by existing law. Significantly, in responding to Seren's specific allegations, AT&T and TCI did not attempt to provide public policy support for TCI's exclusivity agreements, but instead argued that it is forced to adopt such aggressive practices in order to compete with competitors that employ similar tactics.[18]

AT&T/TCI's arguments are unpersuasive and ring hollow. Program exclusivity agreements distort competition and are not necessarily protected under the Telecommunications Act. The program access rules contained in the Cable Act establish the <u>minimum</u> activities that

[17] Seren Petition to Deny, p. 2.
[18] AT&T/TCI Reply Comments, p. 66

are prohibited and provides the Commission with sufficient flexibility to prohibit additional types of conduct. Indeed, in adopting the Act's program access provisions the legislative history indicates that while Congress intended to allow exclusive contracts between non-vertically integrated entities in situations where there is effective competition it did not intend that they be utilized in the absence of effective competition:

> *Where there is no effective competition, however, exclusive arrangements will tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining the exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal.*[19]

Moreover, in implementing Section 628(b) the Commission specifically indicated that its authority extended beyond vertically integrated programmers and cable operators stating:

> *This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of 628(b) applies on its face to all cable operators.*[20]

As noted above, in its recently released *Fifth Annual Competition Report* the Commission recognized the strategic importance of regional sports programming and the potential negative effects of exclusive agreements on such programming. In summarizing its findings in the *Report,* the Commission indicated that *the "distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace,"* and indicated that it would *"continue to monitor*

[19] Senate Committee Report, Rpt. 102-92, to the Cable Act of 1992.
[20] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd. 3359 (April 1, 1993)(FCC 93-178).

this issue and the impact on the competitive marketplace."[21] Hiawatha respectfully submits that the time for monitoring this issue has passed and it is now time for the Commission to take affirmative steps to eliminate anticompetitive exclusivity agreements for regional sports programming.

Further, even assuming, without conceding, that AT&T/TCI are correct that the Commission lacks the authority under the program access rules to prohibit exclusivity agreements between non-vertically integrated programmers and MVPDs, it is nevertheless well established that the FCC has the authority to impose conditions on a transfer of control that have the effect of restricting an activity that might otherwise be lawful if such conditions are in the public interest. As discussed above, the FCC has not hesitated to exercise this authority in other merger proceedings involving applications for consent to transfers of control that implicate the "pro-competitive policy framework of the Telecommunications Act of 1996.

The entire merger between AT&T and TCI is premised on the cynical belief that size and scale alone are necessary to provide competitive cable and telephone service. Yet, the *Fifth Annual Competition Report* confirms that it is the activities of smaller overbuilders and new entrants that is introducing competition. AT&T and TCI should not be allowed to leverage their size to strangle this nascent competition. The Commission should expressly condition its consent to the transfer of control between AT&T and TCI on the agreement of AT&T and TCI to waive the enforcement of existing exclusive access agreements for regional sports programming.

II. Conclusion

TCI has been able to leverage its entrenched monopoly position over a large number of cable subscribers throughout the Upper Midwest to extract exclusive access arrangements for

[21] *Fifth Annual Report,* ¶ 12.

essential regional sports programming that effectively precludes meaningful competition in individual communities. TCI's ability to abuse its market dominance in this manner, if left unchecked, will be perpetuated and reinforced by the size and scale it will obtain as a result of its proposed merger with AT&T. In addition, the ability of a combined AT&T and TCI to include exclusive regional sports programming into a bundled voice, data and video offering will distort competition, and is clearly against the public interest. In other merger proceedings involving applications for consent to transfers of control, the FCC has explicitly held that the public interest standard includes implementation of the pro-competitive national policy framework of the Telecommunications Act of 1996.

Accordingly, based on all of the above, the Commission should deny the proposed transfer of control absent an agreement on the part of AT&T and TCI that they will waive any exclusive access arrangements for popular regional sports programming.

Respectfully submitted,

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December 30, 1998

CERTIFICATE OF SERVICE

I, Sean Stokes, hereby certify that on this 30th day of December 1998, I caused copies of the foregoing Petition to Deny to be served on the parties on the attached Service List, by hand delivery.

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